



Wafula v Associated Construction Co. Ltd (Employment and Labour Relations Appeal 10 of 2023) [2023] KEELRC 2195 (KLR) (21 September 2023) (Judgment)

Neutral citation: [2023] KEELRC 2195 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KAKAMEGA
EMPLOYMENT AND LABOUR RELATIONS APPEAL 10 OF 2023**

**JW KELI, J
SEPTEMBER 21, 2023**

BETWEEN

MARK WAFULA APPELLANT

AND

ASSOCIATED CONSTRUCTION CO. LTD RESPONDENT

JUDGMENT

1. The Appellant being dissatisfied with the Ruling and order of Hon. L. Kassan (CM) delivered on the 30th November 2022 at Kakamega CMCC No. 44 of 2020 between Mark Wafula v Associated Construction Company(K) Limited filed Memorandum of Appeal dated 28th December 2022 seeking the following orders:-
 - a. The Appeal herein be allowed.
 - b. The ruling and decision of the Trial Magistrate in subordinate court to be set aside and be replaced by an independent substituted order that was dismissing the appellant's application and thereafter make an order that the preliminary Objection that was upheld to be dismissed and the said application be allowed so that the application dated 8th July 2021 be set down for hearing interpartes and final disposal on merit.
 - c. The Respondent be condemned to pay the cost of this appeal and the cost of the application and the preliminary objection on a point of law in the lower court.
2. The Appeal was premised on the following grounds:-
 - i. That the learned trial Magistrate erred in law and fact in upholding the preliminary objection and dismissing the appellant's application dated 6th October 2021 without considering the grounds, facts and averments on the face of the said application, the supporting affidavit and the written submissions thereof.



- ii. That the learned trial Magistrate erred in law and fact by failing to deliver a justified ruling in the interest of justice by only basing on technicalities which were against the substantive grievances outlined in memorandum of claim that had been lodged in this court and against the spirit of *the Constitution* 2010.
- iii. That the learned trial Magistrate erred in law and fact by upholding the preliminary objection and dismissing the applicant's application dated 6th October 2021 by not considering that he had the judicial power and authority to ensure that he arrives on a favorable decision in the interest of natural justice for both parties.
- iv. That the learned trial Magistrate erred in law and fact by not finding in favour of the appellant in respect of the said application and thereby denying the appellant a fair hearing as enshrined in *the Constitution* 2010.
- v. That the learned trial Magistrate erred in law and fact when he ignored to consider and take into account the overwhelming evidence, explanation, submissions, reasons and the circumstances the appellant advanced to this court to enable the court grant him the orders that he had sought in the said application.
- vi. That the learned trial Magistrate erred in law and fact in by only accepting the respondent's case and submissions without considering the fact that the appellant had already suffered great loss and damage at the instance of the respondent who did not honour the terms and conditions of employment as per the employment and labour acts.
- vii. The said ruling and decisions as rendered by the learned magistrate herein was against the judicial principles , trends and precedents regarding to cases and applications of this nature.
- viii. That the learned trial Magistrate erred in law and fact by being biased in a sense that his ruling without considering that the applicant had been denied some incentives and relieves that were by statute entitled to him as an employee of the respondent which he had not received since his application to restate his application for setting aside the Order of dismissing his claim for want of prosecution was denied.
- ix. That the Trial Magistrate therefore was further biased in his ruling and therefore misdirected himself in discharging the administrative action in the interest of justice.

Written submissions on the appeal

3. The court directed that the Appeal be canvassed by way of written submissions. The Appellant's written submissions drawn by M/S Elizabeth Chungu & Co Advocates were dated 26th May 2023 and received in court on the 29th May 2023. The Respondent's submissions drawn by K.M Mburu & Associates were dated 17th July 2023 and received in court on the 25th July 2023.

Background to the appeal

4. The Respondent filed a suit on basis of unlawful termination vide Kakamega CMELRC CASE NO. 44 of 2020 against the Respondent vide a statement of claim dated 22nd January 2020 seeking the following reliefs:-
 - a. A declaration that the said termination of the claimant's service and or employment by the respondent was unlawful, unfair and or illegal.



- b. Payment of the sum of money under paragraph 7 above as damages for the loss of employment amounting to Kshs. 880,211/-
 - c. Interest and cost and incidentals to this suit.
 - d. Certificate of service
 - e. Alternatively, if the court is not inclined to order for payment of statutory deduction to the claimant directly then it should go ahead and direct that such amount which includes NHIF, NSSF and PAYE remissions should be directly paid to the relevant institutions for the benefit of the claimant.
 - f. Any other of further relief as this honourable court may deem fit and just to grant. (pages 1-30 the record are all pleadings by the plaintiff before the lower court) at page 34 was reply to the defence.
5. The Respondent entered appearance and filed defence pleadings and documents (At pages 31-33 of the record was the defence case).
 6. The suit was marked as closed by Hon.H. Wandere (S.P.M)on the 15th June 2021 for non-attendance by both parties.(page 62 of the record).
 7. The appellant made an application dated 8th July 2021 seeking to reinstate the suit with grounds for the non-attendance. The application was on the 14th July 2021 fixed for hearing on the 21st September 2021.
 8. On the 21st September 2021 both parties being absent the Learned Magistrate dismissed the matter under order 17 Rule 2 of the Civil Procedure Rules.
 9. The appellant filed a further application dated 6th October 2021 and the same was fixed for hearing by Hon Ndururi on the 26th October 2021.
 10. The Respondent then filed a preliminary objection dated 21st October 2021 on ground that the court lacked jurisdiction for being functus officio to hear the further application having expressed itself on the 21st September 2021 with finality and that the application did not meet the threshold of order 45 on review.

Determination

11. Having read the grounds of appeal, perused the record and submissions the court was of the considered opinion that the issue for determination was Whether the trial court erred in holding it was functus officio.
12. The appellant submits on the merit of their appeal and reiterates the background of the appeal and submits that that the decision was contrary to the provisions and tenets of *the constitution* specifically article 159 and that the counsel mistake ought not be visited on the claimant. The appellant urged the court be guided by principles on role of court on appeal in *Selle & Another v Associated Motor Boat Co. Ltd & others (1968)EA 123* where the court, inter alia, held that:- ‘the court must reconsider the evidence , evaluate it itself and draw its own conclusions through it should always bear in mind that it neither has seen or heard the witness and should make due allowance in that respect.’”

Respondent’s submissions



13. The respondent submits that the applicant did not understand the ruling being that the subordinate court had performed its duties hence was functus officio. That the application sought to reinstate an application whose suit had been dismissed hence lacked feet to stand on and to sit on appeal on own decision.
14. The respondent submits that the prayer on appeal are vague and incapable of being granted as the court would be acting in vain if it allowed the appeal as there was no court order issued on the 21st July 2018 as prayed in the application dated 6th October 2021 and in any event there is no suit hence the orders will be in vain.
15. The respondent submits on Article 159 of *the Constitution* that a warning shot came from Nicholas Kiptoo Salat v IEBC & 6 Others (2013)e KLR where the court of Appeal held that courts must never provide comfort and cover to parties who exhibit scant respect for the rules and timelines hence the appellant cannot invoke Article 159 of *the Constitution* to oust mandatory rules of procedure as was held in African Oil Turkana Limited & 2 others v Edward Kings Onyancha Maina & 2 others (2016) e KLR.
16. I am guided by the principles set out by the Court of Appeal in *Selle & Another v Associated Motor Boat Co. Ltd & others* (1968)EA 123 where the court, inter alia, held that:- ‘the court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it neither has seen or heard the witness and should make due allowance in that respect.’ I will proceed to evaluate the ruling of trial court on the preliminary objection dated 21st October 2021 and reach my own conclusion. The chronology of events leading to the preliminary objection are outlined above.
17. The trial court dismissed the application dated 8th July 2021 for non-attendance by both counsel on the 21st September 2021 and from record of the court both parties were absent. The application was not heard on merit.
18. A further application before the court was dated 5th October 2021. It sought an order for the review and setting aside the trial court’s orders made on the 21st July 2021 dismissing the applicant’s application dated the 8th July 2021 under Order 17 Rule 2 for want of prosecution and that the application be set down for hearing inter parties.
19. The trial court upheld the preliminary objection to find it was functus officio. The Hon. Kassan held that:- ‘the court had exercised its decision in giving the Claimant opportunity to be heard and the main suit was already dismissed on the 21st September 2021 thus determining the closing of this matter.’ The Hon Magistrate further held that the court discharged its duty on the application hence functus officio as stated in the preliminary objection.
20. The trial court relied on the definition of functus officio by the Supreme Court in *Raila Odinga & 2 others v Independent Electoral and Boundaries Commission & 3 others* (2013)e KLR to hold that the court already dealt with the application when the claimant was given opportunity to be heard and did not make an appearance. The Supreme court observed in *Raila Odinga & 2 others*(supra) :- ‘We, therefore, have to consider the concept of “functus officio,” as understood in law. Daniel Malan Pretorius, in “The Origins of the functus officio Doctrine, with Specific Reference to its Application in Administrative Law,” (2005) 122 SALJ 832, has thus explicated this concept: “The functus officio doctrine is one of the mechanisms by means of which the law gives expression to the principle of finality. According to this doctrine, a person who is vested with adjudicative or decision-making powers may, as a general rule, exercise those powers only once in relation to the same matter.... The [principle]



is that once such a decision has been given, it is (subject to any right of appeal to a superior body or functionary) final and conclusive. Such a decision cannot be revoked or varied by the decision-maker.”

19. This principle has been aptly summarized further in *Jersey Evening Post Limited v A1 Thani* [2002] JLR 542 at 550: “A court is functus when it has performed all its duties in a particular case. The doctrine does not prevent the court from correcting clerical errors nor does it prevent a judicial change of mind even when a decision has been communicated to the parties. Proceedings are only fully concluded, and the court functus, when its judgment or order has been perfected. The purpose of the doctrine is to provide finality. Once proceedings are finally concluded, the court cannot review or alter its decision; any challenge to its ruling on adjudication must be taken to a higher court if that right is available” [emphasis supplied]. “The Supreme Court emphasised the word ‘finality’ as a key ingredient of functus officio.
21. In *Lawrence Ong’eni Mokaya v Alice Onserio* [2020] eKLR the court considered the application of the doctrine of functus officio and observed:- ‘30. The persuasive authority of *Mombasa Bricks & Tiles Ltd & 5 Others vs Arvind Shah & 7 Others Civil Suit No. 9 of 2011*[2018] eKLR, also offers useful insight on this issue;

“I understand the doctrine, like its sister, the res judicata rule to seek to achieve finality in litigation. It is a way of a court saying, ‘I have done my part as far as the determination of the merits are concerned hence let some other court deal with it at a different level’. It is designed to discourage reopening a matter before the same court that has considered a dispute and rendered its verdict on the merits. It however does not command that the moment the court delivers its judgment in a matter then it becomes an abomination to handle all and every other consequent, complementary, supplementary and necessary facilitative processes. As was held by the court of Appeal in *Telkom Kenya Ltd vs John Ochanda*, the bar is only upon merit-based decisional engagement. To say otherwise would be to leave litigants with impotent decision incapable of realization towards closure of the file..” I find the foregoing decision proper and very persuasive. The impugned decision by Hon. L. Kassan (CM) followed the decision by Hon. H Wandere (SPM) where following the failure by both parties to attend court for hearing of the application seeking to reinstate the suit on the 21st September 2021 made an Order- “This Matter is dismissed under Order 17 Rule (2) CPR.” The court holds that the learned magistrate did not consider the application dated 8th July 2021 on merit hence not functus officio. Order 17 rule 2 of the CPR reads ‘(1) In any suit in which no application has been made or step taken by either party for one year, the court may give notice in writing to the parties to show cause why the suit should not be dismissed, and if cause is not shown to its satisfaction, may dismiss the suit. (2) If cause is shown to the satisfaction of the court it may make such orders as it thinks fit to obtain expeditious hearing of the suit. (3) Any party to the suit may apply for its dismissal as provided in sub-rule 1. (4) The court may dismiss the suit for non-compliance with any direction given under this Order.”
18. The court finds that the trial court dismissed the application seeking to reinstate the suit on basis of non- attendance and not on merit. The finding of the trial court that it had discharged its duty on finality was thus erroneous. In holding so I am guided by the Court of Appeal decision on functus officio barring the court from further engagement in the matter in the Court of



Appeal in Telkom Kenya Ltd vs John Ochanda, cited in Lawrence Ong’eni Mokaya v Alice Onserio [2020] eKLR where the court of appeal observed: ‘ the bar is only upon merit-based decisional engagement. To say otherwise would be to leave litigants with impotent decision incapable of realization towards closure of the file..’

22. The trial court thus held erroneously that it was functus officio as the application sought to be reinstated had not been heard on merit but was dismissed for non -attendance by the parties under Order 17 Rule of the Civil Procedure Rules(supra).
23. The Respondent relied on decision in Nicholas Kiptoo Salat v IEBC & 6 Others (2013)e KLR where the Court of Appeal held that courts must never provide comfort and cover to parties who exhibit scant respect for the rules and timelines hence the appellant cannot invoke article 159 of the constitution to oust mandatory rules of procedure as was held in African Oil Turkana Limited & 2 others v Edward Kings Onyancha Maina & 2 others (2016)e KLR. I did not find the basis of this submission as no mandatory provision was cited to have been violated by the appellant.
24. I do agree that Article 159(2)d) of the Constitution that, ‘justice shall be administered without undue regard to procedural technicalities’ is not a panacea for all procedural flaws. In the instant case I find the appellant can seek cover under the article 159 on the wrong date indicated under the prayer in the application dated 6th October 2018 as 21st July 2018 as dates of the court is matter of court record. The court in allowing the appeal would thus not act in vain based on wrongly cited date.
25. The court in the upshot enters judgment for the appellant by allowing the appeal and setting aside the ruling of Hon. L. Kassin(CM) dated 30th November 2022 in its entirety and in place Judgment is entered that the notice of preliminary objection dated 21st October 2021 is dismissed with costs in the cause. The court orders that the application dated 6th October 2021 be placed before the Magistrate court for hearing and determination on merit.
26. No orders as to costs in the appeal.
27. It is so ordered.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT KAKAMEGA THIS 21ST SEPTEMBER 2023

JEMIMAH KELI

JUDGE

In The Presence Of:-

Court Assistant : -Lucy Macheso

For Claimant:- Absent

For Respondent: -Mburu

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